No. 34110-1-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

JOSHUA A. GATHERER, Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

On August 16, 2014, Katie Watkins attended a beach party with a large group of her friends. Report of Proceedings (RP) 98. The beach, known locally as Big Beach, is approximately fifteen miles south of Asotin, Washington, on the Snake River. RP 48, 100. While the party was not specifically for her, it was her birthday. RP 49, 98. Many of the party goers spent the night on the beach. RP 98. Ms Watkins stayed in a tent as did most of those who spent the night on the beach. RP 99. Also in attendance was the Appellant, Joshua A. Gatherer, who was there with his girlfriend. RP 103-104. The Appellant had a tent near the camp trailer of Chas Bolon.[1] RP 101. The party goers drank alcohol, played music, and otherwise enjoyed the beach and each other's company. RP 98-99. Prior to this evening, Ms Watkins and the Appellant had a close friendly relationship. RP 96. Ms Watkins viewed him as "like a brother" to her. RP 96.

Late into the evening, the party broke up and people drove home or retired to their tents or sleeping arrangements. RP 101. The last two people who stayed up were Ms Watkins and the Appellant who sat up and talked under Mr. Bolon's camper awning. RP 101-

[1]Chas Bolon was the only party goer who brought a camper trailer which became the "base of operations" for this party. RP 101. He also brought a "DJ" system for playing the music. RP 98.

102. After a period of conversation, which included talk about Ms Watkins' last relationship, the Appellant suddenly approached, leaned in grabbing her chair, and kissed her. RP 102-103, 133. Ms Watkins pulled back and protested, asking him, "What are you doing, your girlfriend's right over there in a tent." RP 103. The Appellant replied that his girlfriend had given him a "hall pass."[2] The Appellant then kissed her again and tried to remove her shirt.[3] RP 104, 106-107. At that point, Mr. Bolon emerged from his camper and went around behind the trailer to urinate and the Appellant immediately stopped his assault and backed away. RP 104, 105. Mr. Bolon finished and retired back into his camper. RP 105.

After Mr. Bolon had gone back to bed, the Appellant scooped[4] Ms Watkins up, collected a blanket off of a nearby table, and began packing her down toward the water and onto the beach. RP 105-106. Ms Watkins resisted, attempting to grab onto nearby objects and hitting the Defendant on his backside. RP 107. When he reached a location farther removed from the tents and trailers, he tossed the

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[2]The term "hall pass" references permission from the wife or girlfriend to have sex with other people and was the title of a 2011 comedy movie wherein several of the characters are granted permission from their wives to have extramarital relations. RP 104,142-143.

[3]Ms Watkins was wearing a "shoulder shirt" with elastic shorts and a two-piece swimsuit underneath. RP 106.

[4]Ms Watkins testified that the Appellant put her up over his shoulder with her head and torso draped over his back and her legs extending forward in front of him. RP 106

blanket on the sand and put Ms Watkins on the blanket. RP 109. The Appellant immediately got on top of Ms Watkins, straddling her and holding her down. RP 110. The Appellant then began pushing her shirt and swimsuit up exposing her breasts. RP 110-111. He then started suckling and biting her breasts. RP 111. Ms Watkins continued to protest, telling him to stop. RP 111. At this point she told him, "Joshua Ames Gatherer, stop it right now." RP 111. The Appellant persisted, and continued kissing her on the neck and lips. RP 111. He then began pulling her hair. RP 112. At one point the Appellant tried to put his hand down her shorts, touching her vaginal area, first on the outside of the swimsuit, and then tried to go inside the swimsuit. RP 112-113. Ms Watkins physically resisted to no avail, and told him she would scream if he didn't stop. RP 113. The Appellant immediately got up and put his hands up. RP 113-114.

Ms Watkins got up off the ground, fixed her clothes and began walking back toward the trailer. RP 114. The Appellant came up from behind, grabbed her by the hair and stated, "You liked it." Ms Watkins told him that she didn't like it. RP 114-115. He pulled harder and repeated his statement, "You liked it." RP 115. Ms Watkins told him, "No, I didn't." RP 115. Continuing to pull her hair, he demanded a third time, " You liked it." RP 115. At that point, realizing he would not let go until she agreed, Ms Watkins relented and said, "Yeah, sure I did." RP 115. The Appellant then told her not to tell anyone. RP

115. Noone heard any commotion during the attack. RP 159, 194, 208, 295-296, 318-319.[5] Mr. Bolon was running a generator to power a fan in his camper. RP 159.

The Appellant retired to his tent with his girlfriend and Ms Watkins went to her tent. RP 115. She sat down in the tent and brushed the sand off of her feet while she attempted to process what had occured. RP 116. She reflected on the events and how he had hurt her, and how she never believed, before that night, he would ever hurt her. RP 116.

In the morning, Ms Watkins woke early and went down to the beach. RP 117. She sat and contemplated the events of the previous night. RP 117. Later that morning the Appellant approached her and stated, how it was "really weird" what had occurred the night before. RP 117. He didn't express any concern for her well being. RP 118. Later, Mr. Bolon was going into Asotin to get water and Ms Watkins asked to go along. RP 118, 160. During the trip, she disclosed what had occurred and told Mr. Bolon that the Appellant had tried to rape her the night before. RP 118, 160-161. She asked Mr. Bolon not to say anything, but to look out for her that day, and to

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[5]The defense called Savanah Johnson, to testify that she was at the party and saw none of the events described by Ms Watkins. RP 263. However, Johnson did not spent the night, and from her testimony, it is clear that she left before the Appellant sexually assaulted Ms Watkins. Johnson testifed that people were still dancing and partying and nobody had gone to bed when she left the beach and drove home. RP 263, 264, 266.

make sure they weren't left alone. RP 118-119. Neither Ms Watkins, nor Mr. Bolon reported the Appellant's crimes to the police at that time. RP 120, 161-162. Ms Watkins hoped to simply forget about that night and put it behind her. RP 120-121.

A few months later, Ms Watkins was drinking with Summer Smith, who was a friend. RP 122. Ms Watkins became intoxicated and began crying. RP 122. She then confided in Ms Smith about what the Appellant had done to her. RP 122. Ms Smith then revealed her own experiences with the Appellant. RP 122.

Summer Smith and the Appellant had dated for several years off and on, and during their relationship, the Appellant had forced himself sexually on her and did so on several occasions. RP 226-240. When Ms Watkins learned that she was not the only person he had done this to, she decided to report this crime. RP 122-123. Ms Smith, also concerned that the Appellant had done this to someone else, decided to report the Appellant for raping her. RP 123.

Both Ms Smith and Ms Watkins went to the Lewiston[6] Police Department and spoke with Detective Nick Eyler. RP 218. Detective Eyler spoke with Ms Watkins and determined that her case occurred in Washington and would need to be referred to the Asotin County Sheriff's Office. RP 218. Detective Eyler then spoke briefly with Ms

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[6]Lewiston is a city in Idaho and is just across the Snake River from Asotin and Clarkston, Washington.

Smith and arranged a time for her to come in for a formal interview. RP 219. Ms Smith was ultimately interviewed and Detective Eyler asked her if she would be willing to place a call to the Appellant and confront him concerning her allegations. RP 219-220.

In a "confrontation call" the complainant calls the alleged perpetrator and engages them in a conversation concerning the crime.[7] RP 220. This call is then recorded by law enforcement. RP 220. This is a particularly useful investigative technique as the offender is much more likely to be honest with the victim than in a police interview room. RP 221. Additionally, false accusations can be identified based upon the purported victim's statements and reactions, as well as the suspect's responses. RP 221. These calls are often made well after the event and so they often require and introduction or pretext for why the victim is calling to talk about the events at that time. RP 221-222.

Because it had been a substantial time since the Appellant had raped Ms Smith, her call would likely seem awkward and out of place. RP 222. For this reason, it was decided that Ms Smith would discuss the fact that the Appellant had tried to rape Ms Watkins as the precipitating event that led Ms Smith to call him. RP 222.

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[7]Idaho is a "one party consent" state and no permission is required to record a conversation so long as one person consents. RP 220. Idaho Code § 18-6702(2)(c) and (d).

Ms Smith placed a call to the Appellant on October 10, 2014. RP 219. During the call, Ms Smith confronted the Appellant with the accusations concerning Ms Watkins. RP 226-227. She told him she had heard about what he had done to Ms Watkins. RP 226-227. Therein she stated and he replied:

> SMITH: Okay. So, I – just found out about -- happened with Katie, and -- you want to tell me a little bit more about that? Because I'm kind of freaking out a little bit.
>
> GATHERER:(Inaudible)? Yeah, I just (inaudible) way -- way too drunk, and I apologized to her about that. That was horrible.

RP 226-227, Exhibit (Ex) P-1. The Appellant minimized and claimed that he was too intoxicated to remember what had occurred on the beach with Ms Watkins. RP 227-228. In response, Ms Smith stated, "This is like big . . ." and the Appellant replied, "Yeah." Ms Smith then continued:

> SMITH: Like, with me, (inaudible), like when I got home from my trip. Just like -- like even after I talked to you about it. Like you -- like I told (inaudible), like I had to like hit you and like pinch you to get you to stop after I said stop. And like sometimes you still didn't and like you still (inaudible). And like I just don't -- like then you said, like you were sorry and you were gonna stop. And so, like it's just -- I don't -- that -- happen again. Because it didn't matter what I said to you and it didn't matter -- (inaudible) tried to push you off of me or like pinched you, like (inaudible). Like -- still happened, like you still had sex with me. It didn't matter what I did.

RP 229, Ex. P-1. The Appellant replied: "This wasn't -- like that that I know of." RP 230, Ex. P-1. Ms Smith challenged him on this and he

replied, "I really don't know. I -- actually don't." Ms Smith then clarified, "What you did to me was rape" and the Appellant agreed. RP 229, Ex. P-1. The Appellant acknowledged that they had discussed it and that he knew it was rape. RP 229, Ex. P-1. Ms Smith told him that it obviously didn't make a difference. RP 229, Ex. P-1. In response, the Appellant protested, "It hasn't been -- it hasn't been an issue until -- this (inaudible) incident.?" RP 229, Ex. P-1. Ms Smith continued to challenge him regarding how they had talked about it being rape, he knew it was rape, and how it happened again, referencing is attack on Ms Watkins. RP 229-230, Ex. P-1. He replied, "I know. I'm sorry." RP 230, Ex. P-1. Throughout the recording, Ms Smith returned to the events of August 16, 2014, on the beach and discussed the similarities to his crimes against her. RP 226-240, Ex. P-1. At one point, the Appellant finally distinguished his crimes against Ms Smith from his attempted rape of Ms Watkins.

> SMITH: I (inaudible) -- I don't (inaudible) say that. I (inaudible) even know what to say to that. (Inaudible) that -- That's not -- I shouldn't ever have to say that to you. "Oh, yeah, we broke up because he raped me." Like really? You know, (inaudible) listen. Like, I mean, I just, I don't get it. Like why -- (inaudible) why you do it. Like, I need to understand that.
>
> GATHERER: Wait, wait, wait, wait, wait. You're -- your making it sound like Katie and I had sex.
>
> SMITH: No. I don't think that Katie and you had sex. But I also don't think--
>
> GATHERER: Okay.

SMITH: --what did happen was okay.

GATHERER: Okay. Yeah. I agree with (inaudible).

SMITH: It's not okay to pick somebody up and carry them away from (inaudible) and -- try to take their clothes off and try to touch them when they're telling you no and that they don't want you to. Do you understand that?

GATHERER: Yes, I understand that.

SMITH: And -- why do you think that's okay?

GATHERER: I didn't think it was okay. I don't think it's okay.

SMITH: Okay. Well, -- you make somebody say that they like it before you leave them alone, that kind of makes it seem like you want (inaudible) okay. Yeah?

GATHERER: (Inaudible) know.

SMITH: You don't know. Don't tell me you don't know.

GATHERER: No. (Inaudible).

RP 234-235, Ex. P-1. Later on in the conversation, Ms Smith challenged the Appellant further, with regard to Ms Watkins.

SMITH: When we talked -- when we talked you told me that it wouldn't happen again with me, and then it did. And we talked about it more. And -- like you said that it wouldn't happen with anybody else. And like now, like, -- (inaudible), Josh, and I don't care if you were drunk and I don't care if you were drinking -- like, it happened. Because you know what? If there hadn't have been a bunch of other people camping there, that made you nervous that Katie being loud was going to like wake them up or hear them or see them, like -- I don't have any doubt that that's what would have happened. Like that you would have had sex with her, that you would have raped her. Do you?

GATHERER: I don't know. I don't know. But I don't think so.

SMITH: You don't know.--

GATHERER: Okay--

SMITH: But you don't know. Okay? And that is f-----g terrifying. (Inaudible) understand that? Do you understand that I told you no, and that this all happened, and you did it again anyway, and that now like it's happening again. But do you understand like -- that that's a problem?

GATHERER: Yeah.

SMITH: (Inaudible) do about it?

GATHERER: (Inaudible) just going to – Yeah.
SMITH: Just going to yeah. How (inaudible). You can't just lose control, or not care enough to be careful, or not respect somebody, or not believe somebody. Like, okay, maybe you didn't believe me, like, the very first time it happened. But like what you didn't believe Katie when she was telling you?

GATHERER: I really don't -- I really don't know. (Inaudible).

RP 237-238, Ex. P-1 (*expletive omitted*). The conversation concluded by the Appellant making an ominous and statement about "solving the problem" and indicating that he couldn't find his ammunition, making a thinly veiled suicide threat. RP 239- 240, Ex. P-1.

Detective Jackie Nichols of the Asotin County Sheriff's Office was contacted and subsequently interviewed Ms Watkins. RP 43, 47. Thereafter, Detective Nichols and Detective Eylar arranged to interview the Appellant at the Lewiston Police Department. RP 51. During the Appellant's interview, when asked about Ms Watkins, the

Appellant stated he first met her after she had a series of "one night stands with his roommate." RP 58. The Appellant claimed that they had been making out and that he didn't recall what had occurred. RP 59. When confronted with Ms Watkins' accusations, he responded that it could have happened, but he didn't remember. RP 63.

Approximately a half hour into the interview, Detective Eylar confronted the Appellant with inconsistencies in his statement to the police. RP 63-64. Det. Eylar played a small portion of the recording of the October 10, 2014 confrontation call and the Appellant became noticeably uncomfortable, requesting to take off his coat. RP 64, 76-778, 242-243.

The Appellant was charged by way of Information with Indecent Liberties with Forcible Compulsion. Clerks Papers (CP) 1. The matter proceeded to trial and the Appellant waived jury and had the matter tried to the bench. CP 11, RP 8-9.

Prior to trial, the Appellant sought to have the confrontation call and recording suppressed on the basis of the Washington Privacy Act, RCW 9.73, *et. sec*. based upon the lack of two party consent. RP 12-15. The Appellant also objected pursuant to ER 404(b), but made very little, if any, substantive argument on that basis, relying primarily upon the Privacy Act objection. RP 12-15. With regard to the Privacy Act, the State pointed out that the recording was made in Idaho, by an Idaho law enforcement officer, without any input or

involvement from any Washington State officer. RP 15-19. The State further stated that any information in the recording concerning "other crimes" was not being offered as propensity evidence, but rather, was simply the context in which Ms Smith confronted the Appellant concerning the new allegations concerning Ms Watkins. RP 19-20. The State pointed out that, without that context, the Appellants' admissions concerning Ms Watkins would lack meaning. RP 20. The State further pointed out that, in the context of a bench trial, the risk that the evidence would be considered for improper purposes was virtually eliminated. RP 21. The trial court considered the Appellant's motion on the morning of trial which commenced December 9, 2015. RP 12. The trial court overruled the Appellant's Privacy Act objection. RP 29.

During trial testimony, Detective Nichols testified concerning her training and experience in investigating sex crimes. RP 36. She stated that it is not uncommon for victims to delay reporting these types of crimes, especially where there is an established and significant relationship between the perpetrator and the victim. RP 36. She explained the reasons that, in her experience, a victim of such an awful crime would not immediately report it to police. RP 37-38. She testified concerning her training in interviewing victims and suspects. RP 40. Detective Nichols described how perpetrators will often, during interviews, make inappropriate and derogatory or

denigrating comments about the victim for the purpose of discrediting the victim. RP 39. She further related how changes in behavior can be a signal that the interviewee is being deceptive. RP 40.

Detective Nichols testified that she interviewed Ms Watkins. RP 47-51. During her testimony, Detective Nichols was asked about Ms Watkin's demeanor during the interview. RP 50. Detective Nichols described Ms Watkins as "straightforward" and "uncomfortable talking about sexual . . . things." RP 50. Detective Nichols stated that "she seemed believable" and "didn't show signs of deception." RP 50. No objection was made to the Detective's answer. RP 50. The State's attorney then redirected the Detective concerning Ms Watkins' emotional demeanor, to which Detective Nichols responded that Ms Watkins' emotions were contextually appropriate throughout. RP 50. The detective further testified that she did not observe any of the indicators of deception she previously identified. RP 50. The Defense did not object. RP 50.

Detective Nichols testified concerning the joint interview of the Appellant at the Lewiston Police Department. RP 51. She was asked concerning his demeanor. RP 53. She described him as follows:

> A He was cooperative and polite. When -- as we got into the -- part of the interview about the allegations he was deceptive about--

RP 54. At that point, defense counsel objected, without specifying the basis and State's counsel sought to rephrase and inquired:

> Q Was he emotionally appropriate during the -- during the interviewing?
>
> A Yes. The Appellant initially appeared comfortable but later appeared uncomfortable when confronted with the confrontation call and other discrepancies in his version of events.

RP 54. State's counsel then inquired regarding indicators of deception that she had testified to earlier, and Detective Nichols stated that she did observe behaviors and described them as follows:

> A Yes. When we got into the information about the alleged sexual assaults, he did have indicators of deception, changes in his tone, that type of thing, but also physically becoming too warm, -- wanted to take off his coat -- But because I had heard the confrontation call and -- I knew the answers he was giving were not truthful. Because they were--
>
> Q Or they were not -- at least not consistent with the statements that -- made during the confrontation call?
>
> A Correct.

RP 54. At that point, Defense Counsel objected and stated:

> Your Honor, I wonder if at this point maybe you should caution the witness to not make generalized conclusory statements about whether or not Mr. Gatherer was telling the truth.

RP 54-55. The Trial Court admonished the Detective accordingly, stating:

> You can't comment on -- veracity, the ultimate veracity of any statement. You can testify what you observed and your impressions.

RP 55. Detective Nichols then went on to describe specific inconsistencies between the Appellant's statements to detectives and his conversation with Ms Smith during the recorded call. RP 55.

Detective Nichols testified how, at the outset of the interview, the Appellant used rather derogatory terms to describe how he first met Ms Watkins, stating that she had been having "a series of one night stands" with his roommate. RP 57-58. Detective Nichols contrasted this with how Ms Watkins described him - as "like a brother" to her. RP 58. She testified to his claimed lack of memory regarding the pertinent events due to heavy intoxication. RP 59, 61. She further testified to his obvious discomfort when the confrontation call was played. PR 64.

The Appellant, at no time, objected to any of Detective Nichols testimony concerning her training or experience observing and identifying signs of deception, or her testimony concerning her observations of the Appellant during the interview with the exception of the objection noted above. RP 40, 54-55. Instead, trial counsel inquired further regarding the environment where the interview took place, the uniforms worn by the detectives, whether they were armed, and whether there were other reasons besides deception why a suspect might display signs of discomfort. RP 85-87.

The State called Ms Watkins who testified concerning the attack by the Appellant and her disclosure of this to Mr. Bolon and

later, Ms Smith. RP 95-123. The State also called Mr. Bolon, who was mostly supportive of the Appellant. RP 152-183. Mr. Bolon testified that neither Ms Watkins nor the Appellant[8] appeared drunk when he saw them outside the camper. RP 180, 183.

The State called Saffire Clemenhagen and Christopher Schmidt, both of whom testified concerning their observations of the Appellant and Ms Watkins on the day following the Appellant's sexual attack on Ms Watkins. RP 189-190, 205-206. Both testified to the lack of interaction between Ms Watkins and the Appellant that day, and how, in retrospect, this was out of the ordinary, as Ms Watkins and the Appellant had been very close prior to that night. RP 190, 206. On redirect, Ms Clemenhagen testified as to what Ms Watkins had told her about the Appellant's attack, which was consistent with her report to Mr. Bolon, Ms Smith, law enforcement, and her trial testiomy. RP 199-200.

Detective Eylar testified at trial concerning the confrontation call as well as the interview with the Appellant. RP 213-246. During his testimony, he discussed training and experience with interviewing, including keying in on behavioral changes during the interview. RP 215-216. The Appellant did not object to this testimony. RP 215-216.

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[8]Mr. Bolon's testimony on this point stood in sharp contrast to the Appellant's claim that he was so severely intoxicated that he couldn't remember what had occurred with Ms Watkins.

During Detective Eylar's testimony, the State introduced and played the recording of the confrontation call. RP 226-240. Prior thereto, the State reminded the trial court that, as far as accusations concerning Ms Smith, the State was only offering that information as evidence of the context of the conversation and not as propensity evidence. RP 213. The State specifically asked the court to not consider it as propensity evidence. RP 213. At the time the State offered the recording, defense counsel renewed his objection, but offered nothing further in support thereof. RP 226.

Detective Eylar then testified concerning the joint interview with the Appellant and his demeanor therein. RP 241-243. He testified that the Appellant was relaxed up until the playing of a portion of the confrontation call, at which time be became and remained nervous, removing his coat. RP 242-243. With the exception of the *pro forma* objection to playing the confrontation call, there were no objections during Detective Eylar's direct examination. RP 213-246. Instead, defense counsel questioned Detective Eylar concerning explanations for the change in behavior and discomfort exhibited by the Appellant during the interview. RP 252

During his cross examination of Detective Eylar, trial counsel pointed out that the Appellant was wearing the same coat in court that he was wearing at the time of the interview. RP 253. During redirect, and in response to defense counsel's question, State's counsel

pointed out that the Appellant took the coat off during the playing of the confrontation call in court, similarly to his response during his interview with officers. RP 255. Defense counsel did not object. RP 255.

At the conclusion of trial, the trial judge found the Appellant guilty of Indecent Liberties with Forcible Compulsion for his attack on Ms Watkins. RP 372, 374, CP 15-19. A sentencing hearing was held on February 16, 2016, and the court sentenced the Appellant to a fixed minimum term of fifty-one months with a maximum of life. RP 398, CP 25. The Appellant subsequently filed timely notice of appeal. CP 34.

IV. DISCUSSION

The Appellant raises two primary issues, neither of which merits reversal. The Appellant's recitation of facts and issues raised concerning the admission of the confrontation call demonstrates a complete misunderstanding of the purpose for admitting the call. The Appellant's argument concerning that particular evidence is therefore without merit, as will be addressed below. Further, and while certain questions posed to the detectives by State's counsel were likely improper, the responses elicited therefrom primarily related to proper testimony concerning demeanor, and were therefore allowable. Further, because the Appellant failed to object below, and in fact, pursued additional questioning along the same lines, any objection

thereto was waived. Finally, because the matter was tried to the bench, any error was clearly harmless beyond any doubt.

1. THE COURT PROPERLY ADMITED THE RECORDING OF THE CONFRONTATION CALL WHERE THE DEFENDANT MADE ADMISSIONS TO THIS CRIME IN THE CONTEXT OF UNRELATED ACCUSATIONS BY A PRIOR VICTIM.

The Appellant first argues that the trial court erred in admitting evidence of the confrontation call between the Appellant and Ms Smith. In support of this argument, the Appellant seems to suggest that the evidentiary purpose of the confrontation call was to show how Ms Watkins' allegations "came to the attention of Washington law enforcement." Appellant's Opening Brief (*herinafter* Brief), p. 2, 14. This was never the purpose for which it was offered. The confrontation call was offered as a confession by the Appellant to the acts alleged by Ms Watkins. RP 34. It was neither offered or admitted as propensity evidence.

The Appellant further exacerbates the problem with his false premise when he argues that the court failed to identify a non-propensity purpose for the call. Brief, p. 12. This misstates the record. On each occasion, when the Appellant's objection was discussed, the State clarified the purpose for which the call was being offered and for what purpose the court should consider Ms Smith's

accusations.[9] RP 19-20, 34, 213, 226. With this clarification of the facts of this case, the Appellant's arguments necessarily fail.

The Appellant claims that the confrontation call should not have been admitted under ER 404(b). That rule provides:

> ***Other crimes, wrongs, or acts***. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

ER 404(b). The purpose of the confrontation call was to show that, therein, the Appellant admitted to the acts alleged by Ms Watkins. This is not "other crimes" as contemplated by the evidence rule and is the *corpus* of the crime charged herein. Rather, the Appellant's objection below related to the accusations of Ms Smith concerning the acts of rape committed by the Appellant against her. This would be "other crimes" evidence. However, these accusations by Ms Smith were not offered or relied upon to prove his character or action in conformity with the accusations, but were rather the context in which the Appellant discussed Ms Watkins' accusations and made

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[9]Trial counsel acknowledged that the stated proper purpose of Ms Smith's allegations in the confrontation call was to give context to the Appellant's admissions concerning Ms Watkins in arguing his ER 404(b) objection to portions of the recorded interview with Detective's Nichols and Eyler. RP 65. There, trial counsel requested a "limiting instruction" concerning any discussion of Ms Smith's accusations during the interview. RP 65.

admissions to her claims. This is a permitted use of such evidence and not prohibited by ER 404(b).

It is important to note the facts underlying this call. It had been a substantial period of time since the Appellant raped Ms Smith. It would have seemed out of place for her to suddenly call the Appellant and begin talking to him about raping her. Instead, Ms Smith talked about her experience in the context of Ms Watkins' new accusations. She spoke to the Appellant concerning how they had previously talked about what he had done to her. She spoke of how he had agreed it was wrong and that it wouldn't happen again. She then confronted him with what he had done to Ms Watkins, and how it was the same.

It is her repeated accusations that the Appellant wouldn't take "no" for an answer and her comparisons to Ms Watkins' experience that give meaning to the Appellant's statements as admissions. He made statements like he was "way too drunk," that he apologized to her Ms Watkins and, "That was horrible." RP 227, Ex. P-1. Ms Smith then compared it to her experience, scolding him that being too drunk was no excuse and he made statements acknowledging. RP 227, Ex. P-1. When she clarified that what he had done to her was rape and they had discussed that issue, he told her "It hasn't been an issue until -- this (inaudible) incident." RP 229, Ex. P-1. Several times throughout the call, Ms Smith compared what he had done to her with

what he was accused of doing to Ms Watkins and the Appellant made tacit admissions, agreeing with her characterizations. Without Ms Smith's clarification of her accusations, the Appellant's words would have little to no meaning. This was the context for the conversation and the crimes committed by the Appellant against Ms Smith were not offered as evidence that the Appellant had the propensity to and therefore, did in fact, sexually assault Ms Watkins. It was offered to show that, in the context of this conversation, the Appellant admitted to sexually violating Ms Watkins. This was the proper purpose of the testimony.

It should be further noted that the State was not offering evidence that the Appellant did, in fact, rape Ms Smith. For the purposes of evaluating the Appellant's admissions, it was not necessary that Ms Smith was, in fact, raped by the Appellant. The only relevant fact was that Ms Smith, during the confrontation call, accused the Appellant of raping her and compared that accusation to the current accusations concerning Ms Watkins, again creating context for his statements and admissions to the charged crime.

The Appellant next argues that the court failed to weigh the probative value against the risk of unfair prejudice. To admit evidence of other crimes or wrongs under ER 404(b), the court must (1) identify the purpose for which the evidence is sought to be introduced, (2)

determine whether the evidence is relevant to prove an element of the crime charged, and (3) weigh the probative value of the evidence against its prejudicial effect. *See* State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). This weighing of the probative value against the danger of unfair prejudice should be conducted on the record. *See* State v. Jackson, 102 Wn.2d 689, 693, 689 P.2d 76 (1984).

Here, while not fully fleshed out, it is clear that the court considered the purposes of the evidence, found it to be probative, and discounted the potential for prejudicial impact in ruling on the Appellant's objection. RP 226, CP 54-55. Here, the court ruled that it was considering the ER 404(b) evidence (Smith's accusations) only as part of the confrontation call and for no other purpose. CP 54-55. While admittedly truncated, it is clear that the court considered the factors prior to admission.

Were this Court to consider the trial courts brief discussion insufficient to satisfy the requirement of an "on-the-record" weighing, the fact that the trial court failed to satisfy that requirement herein is of no consequence in this case.

> [W]here a trial court rules on the admissibility of ER 404(b) evidence immediately after both parties have argued the matter and the court clearly agrees with one side, an appellate court can excuse the trial court's lack of explicit findings.

State v. Stein, 140 Wn. App. 43, 66, 165 P.3d 16 (Div. II, 2007)(*citing* State v. Pirtle, 127 Wn.2d 628, 650, 904 P.2d 245 (1995)). If the record shows that the trial court adopted one of the parties' express arguments as to the purpose of the evidence and that party's weighing of probative and prejudicial value, then the trial court's failure to conduct its full analysis on the record is not reversible error. State v. Asaeli, 150 Wn. App. 543, 576 n.34, 208 P.3d 1136 (Div. II, 2009).

Here, the parties had thoroughly addressed the court with their respective positions on the Appellant's objection. The State reiterated at several points the proper purpose for the evidence and explained its significance. RP 19-20, 34. The Appellant's accusations[10] notwithstanding, the court considered the arguments of both counsel and sided, for the reasons stated by the prosecutor, with the State. For the reasons propounded by the State and adopted by the court, the evidence was properly admitted to demonstrate the context of the conversation and give meaning to the Appellant's statements therein.

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[10]The Appellant claims that the prosecutor argued that, because this was a bench trial, ER 404(b) was irrelevant. Brief, p. 11, fn. 7. This mischaracterizes the State's argument which was that the trial judge was fully capable of gleaning the wheat from the chaff, and consider the evidence only for it's proper purpose. This substantially differs from jury trial. There such prejudicial impact is largely a matter of speculation and the court lacks much control over the prejudicial impacts of such evidence.

Even a complete failure to conduct on-the-record weighing does not necessarily result in reversal. Although a trial court's failure to perform the balancing on the record is erroneous, it is not necessarily reversible error. *See* State v. McGhee, 57 Wn.App. 457, 788 P.2d 603 (Div. I, 1990). In McGhee, the Court stated:

> When the trial court fails to conduct the on-the-record balancing process required by ER 404(b), a reviewing court should decide issues of admissibility if it appears possible after reviewing the record as a whole.

As has been astutely noted:

> [W]hat purpose is served by reversing a conviction where the questioned evidence is relevant and admissible? The trial court's failure to articulate its balancing process does not make admissible evidence inadmissible.

State v. Gogolin, 45 Wn.App. 640, 645, 727 P.2d 683 (Div. I, 1986). Here, it is clear that the recording was admitted for the limited purpose of establishing the context of the Appellant's admissions to Ms Smith and was considered for no other purpose. The Appellant's argument is therefore without merit and does not require reversal of his conviction. On this basis, this Court should affirm the conviction.

2. REVERSAL IS NOT REQUIRED WHERE THE DETECTIVES PRIMARILY TESTIFIED AT BENCH TRIAL CONCERNING THEIR RESPECTIVE OBSERVATIONS DURING THE INTERVIEWS OF THE APPELLANT AND VICTIM, WHERE THE APPELLANT FAILED TO OBJECT ON THE GROUNDS NOW RAISED ON APPEAL.

The Appellant next contends that improper questioning by the State and improper opinion testimony should result in reversal of his charges. The State concedes that questioning of the detectives concerning "signs of deception" is improper under the case law. *See* State v. Barr, 123 Wn.App. 373, 382, 98 P.3d.518 (Div. III, 2004). However, where as here, the question and testimony was not an impermissible opinion on the guilt of the Appellant, and where no objection was raised on the basis of impermissible opinion on veracity, reversal is not required. This is especially true where, as here, the Appellant himself inquired of the detectives concerning "signs of deception" and where the trial court did not consider any improper opinion in rendering the verdict.

As a starting point, while specific questions by the prosecutor called for identification of "signs of deception," the vast majority of the testimony concerned the physical behaviors exhibited by the Appellant. Specifically, the State addressed his visible discomfort during the playing of the confrontation call, manifesting with his request to remove his coat. Neither detective testified that Appellant was guilty of the crime charged or that he wasn't to be believed. Testimony concerning demeanor during a police interview is proper and does not constitute improper opinion testimony. *See* State v. Easter, 130 Wn.2d 228, 243, 922 P.2d 1285 (1996). This would

include unnecessary and unprompted demeaning descriptions of the victim. Detective Nichols' testimony concerning reasons why a victim of rape might delay reporting was likewise proper, and does not constitute improper opinion testimony. *See* State v. Graham, 59 Wn.App. 418, 798 P.2d 314 (Div. I, 1990); State v. Madison, 53 Wn. App. 754, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (Div. I, 1989).

The Appellant did not object below to the testimony of either Detective Nichols or Detective Eylar concerning indications of deception, nor did he object to the prosecutor's question concerning removal of his jacket at trial during the playing of the confrontation call. Pursuant to RAP 2.5, the Appellant cannot now raise this issue unless he can demonstrate a manifest error affecting a constitutional right. RAP 2.5(a)(3). With regard to the situation presented herein, the Supreme Court has stated:

> Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a "manifest" constitutional error. "Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.
>
> Requiring an explicit or almost explicit statement by a witness is also consistent with this court's precedent that it is improper for any witness to express a personal opinion on the defendant's guilt.

State v. Kirkman, 159 Wn.2d 918, 936-37, 155 P.3d 125 (2007). Here, there was no testimony that the Appellant was guilty or was not telling the truth. At best, the testimony was that there were known inconsistencies between his statement to Ms Smith during the confrontation call and his statements to police and that he displayed behaviors which were consistent with deception. This testimony does not rise to the level of manifest error which allows review without preservation of the issue by objection below.

The Appellant argues that he should be allowed to argue these issues on appeal because he did lodge an objection. Preservation of the issue requires a specific and timely objection to the question or testimony. ER 103(a)(1), RAP 2.5(a), State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985)("*A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial.*"). Here, the Appellant's only objection regarding this line of testimony was a request that Detective Nichols "not make conclusory statements about whether or not Mr. Gatherer was telling the truth." RP 53-54. This drew an admonition from the court to the witness against commenting on the veracity of the of the Appellant. RP 54. The Appellant did not otherwise object to any other questions or testimony to this effect. Further, the fact that the Appellant's only objection was sustained suggests that his failure to object to any other similar questions or responses would likewise have been sustained,

had counsel seen fit to object. His sole objection on the basis now raised and the admonition it procured from the court sufficiently cured the concern raised. Complaints concerning other questions and testimony were not preserved by timely and specific[11] objection.

Further, in addition to not objecting, the Appellant spent considerable time questioning the officers and probing the reasonableness of their observations concerning the cause of the Appellant's apparent discomfort. RP 85-88, 252-253. The Appellant, having failed to object and having plowed deeper into the field by questioning the officers concerning this topic, cannot now be heard to complain concerning such testimony.

3. THE PROSECUTOR'S COMMENT THAT THE APPELLANT REMOVED HIS COAT DURING THE IN-COURT PLAYING OF THE CONFRONTATION DOES NOT NECESSITATE REVERSAL WHERE IT WAS IN RESPONSE TO DEFENSE QUESTIONING, COUNSEL FAILED TO OBJECT AND WHERE THE MATTER WAS TRIED TO THE BENCH.

The Appellant's complaint concerning the State's comment on the removal of his coat at trial is likewise not well taken. The question to the officer was in response to the Appellant's own lawyer drawing the detective's attention to the Appellant's coat worn at trial. *See* State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747, 785 (1994) ("*Remarks of the prosecutor, even if they are improper, are not*

[11]Likewise, counsel's objection on the basis of speculation concerning the reasons that victim's might have for delayed reporting does not preserve the issue of officer testimony concerning deceptive indicators, nor does it preserve any issue concerning improper comment on Ms Watkin's credibility.

grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective."). During cross examination of Detective Eylar, defense counsel pointed out that the coat that the Appellant was wearing at trial was the same coat he had worn during his police interview. RP 253. In doing so, the defense opened to the door to this issue. Since the Appellant did not object when the prosecutor followed up, there was no curative instruction requested or given. It is axiomatic that, since this was a bench trial, the court did not need to instruct itself.

Further, because the Appellant failed to object below, he cannot now raise the issue pursuant to RAP 2.5(a). The Appellant has failed to demonstrate that the issue is reviewable; *i.e.*, that the prosecutor's remark concerning the coat was manifest error affecting a constitutional right. RAP 2.5(a).

> [U]nless the remarks of a prosecutor in argument meet the Belgarde test of incurable prejudice, a defendant who makes no objection has waived the right to review even if the remarks touch on a constitutional right.

State v. Klok, 99 Wn. App. 81, 85-86, 992 P.2d 1039 (Div. I, 2000). In State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988), the Supreme Court held that the failure to object at trial waives review unless no curative instructions could have eliminated the prejudice

engendered by the misconduct. Under these circumstances, where the matter was tried to the bench, an objection and admonition would have conclusively resolved any claimed prejudice, even assuming the prosecutor's comments were an improper response to Defense questions. The comment, even if improper, does not rise to the level of manifest constitutional error meriting review of an issue not preserved nor did it, as described more thoroughly below, result in a deprivation of the Appellant's right to a fair trial.

4. PROSECUTORIAL MISCONDUCT DID NOT DEPRIVE THE APPELLANT OF A FAIR TRIAL WHERE NO OBJECTION WAS MADE TO QUESTIONING OR COMMENT AND WHERE THE MATTER WAS TRIED TO THE BENCH.

Even overlooking the procedurally fatal fact that counsel did not object to the now complained of questions or comment of the prosecutor, the Appellant's arguments concerning prosecutorial misconduct are likewise without merit. The Appellant argues that the question posed by the State's attorney, the responses thereto by the detectives, and the comment concerning the Appellant's coat constituted prosecutorial misconduct, necessitating reversal. However, defense counsel waives alleged prosecutorial misconduct by failing to object unless the misconduct is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967, 996 (1999). Here, there

was no objection. Any such objection and admonition would have, without any doubt, neutralized any prejudice where the court would be instructing itself to disregard the question, answer, or comment. Further, and as discussed more thoroughly below, the trial judge is presumed to have only considered proper and admissible evidence in rendering its verdict. *See* State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002). The Appellant's arguments concerning misconduct do not support his request for reversal.

5. ANY CLAIMED ERROR OR MISCONDUCT WAS HARMLESS BEYOND A REASONABLE DOUBT AND THEREFORE THE APPELLANT'S CONVICTION SHOULD BE AFFIRMED.

Assuming *arguendo*, that the Court decides to reach issues which were not objected to below and therefore not properly preserved, and which are only now raised by the Appellant for the first time on appeal, reversal is not merited. Any claimed errors, under the facts of this case, were harmless beyond a reasonable doubt. Under that standard, a conviction won't be reversed where it necessarily appears, beyond a reasonable doubt, that the misconduct did not affect the verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551, 558 (2011). Here, where the matter is tried to a judge instead of a jury, "the trial judge, knowing the applicable rules of evidence, will not consider matters which are inadmissible when making his findings." State v. Miles, 77 Wn.2d 593, 601, 464 P.2d 723 (1970). As later stated by the Supreme Court:

> In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is sufficient to support the judgment or ***unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made***.

State v. Read, 147 Wn.2d at 245, (*emphasis added*)(*quoting* Builders Steel Co. v. Comm'r of Internal Revenue, 179 F.2d 377, 379 (8th Cir. 1950). The Miles presumption is rebuttable, but a defendant must show that either the verdict is not supported by sufficient admissible evidence, or the trial court relied on the inadmissible evidence to make essential findings that it otherwise would not have made. *Id.* at 245-46. There is no claim that there was insufficient admissible evidence to support the conviction. The Appellant instead claims that the court relied upon incompetent evidence.

Here, the complained of opinion testimony drew only the single objection which drew an admonishment of the detective not to testify to the veracity of the any statement. RP 55. The Appellant argues that this somehow evinces that the court considered improper opinion on credibility. To the contrary, it shows that the trial court was aware, as discussed above, that a witness may not testify about the veracity of another witness or statement. As for the complained of comment on the demeanor of the Appellant, as stated above, his discomfort

during the interview was proper for the court to consider in deciding for itself what weight to give the Appellant's statements. It should be further noted that the State did not discuss in closing argument the detectives' testimony concerning any claimed opinions they had formed of the Appellant's credibility or Ms Watkins' credibility. RP 340-345, 358-367.

The Appellant complains regarding the court's consideration of the confrontation call and inclusion of that call in its findings, but as discussed above, the Appellant's statements therein were proper fodder for consideration as they constituted admissions to the accusations of Ms Watkins. The court only considered the allegations leveled by Ms Smith for the purpose of context in interpreting the Appellant's statements in response. RP 226, CP 54-55. The court recognized its obligation to separate the relevant evidence from that which was not relevant and parse out the prejudice therefrom. RP 44. With regard to the joint police interview of the Appellant, the court expressly stated that it would consider only the portions relating to Ms Watkins. RP 66.

In its findings, the court independently found Ms Watkins credible. RP 369, 373. It did so, not because of Detective Nichols' lack of observations of signals of deception, but because the victim's statements about the events had been consistent throughout. RP 369. It did so because there was absolutely no evidence presented

that she had any motivation to fabricate the events she described and the trauma she had suffered. RP 373. In finding the Appellant's claims not credible, the court did not rely upon the detectives' subjective beliefs that the Appellant was showing the various signs of deception they described in their respective testimony or because he removed his coat in court. The court noted the inconsistencies in his statement to police, his statement to Mr. Bolon, and his statements during the confrontation call. RP 370-372. There is no evidence in the record that the trial court relied upon the detectives' opinions or the Appellant's demeanor at trial in deciding the case. The Appellant has not overcome the Miles presumption and demonstrated that the trial court relied upon incompetent evidence, whether objected to or not, "that the induced the court to make an essential finding which would not otherwise have been made." *See* Read, *supra*. The verdict of the trial court should be affirmed.

6. CUMMULATIVE ERROR DOES NOT RESULT IN REVERSAL WHERE, AT BENCH TRIAL, NO ERROR OCCURRED AND WHERE ANY CLAIMED ERROR WAS PRESUMPTIVELY DISREGARDED BY THE TRIAL JUDGE.

Finally, the Appellant claims that cumulative error deprived him of a fair trial. Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair. *See* In re Pers. Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). This doctrine provides that, where

several errors standing alone do not warrant reversal, cumulative error requires reversal when the combined effect of the errors denied the defendant a fair trial. *See* State v. Garcia, 177 Wn. App. 769, 786, 313 P.3d 422 (Div. II, 2013). However, where as here, no error occurred, the doctrine is inapplicable. *See* State v. Warren, 134 Wn.App. 44, 69, 138 P.3d 1081(Div. I, 2006). Further any of the errors complained of herein were not preserved by proper objection which precludes application of the doctrine. *See* State v. Embry, 171 Wn.App. 714, 766, 287 P.3d 648 (2012).

The Appellant was not deprived of a fair trial. The parties were allowed to forward their respective theories of the case. Ultimately, in light of Ms Watkins' detailed account of the incident, the trial court was convinced beyond a reasonable doubt of the guilt of the Appellant. She was consistent in her reports to various persons. Many of the details were corroborated by the testimony of other witnesses and by the Appellant's own statements. He received a fair trial. His conviction for Indecent Liberties With Forcible Compulsion should be affirmed.

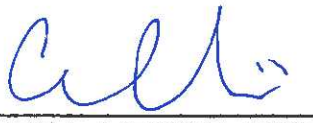
V. CONCLUSION

The confrontation call was properly admitted as an inculpatory statement by the Appellant. The portions thereof relating to Ms Smiths' accusations provided necessary context for evaluating the Appellant's statements and were properly admitted for that limited

purpose. The Appellant's failure to object at trial to the State's questions and the detectives' responses, as well as the responsive question by State's counsel concerning the Appellant's removal of his coat at trial precludes review. Neither opinion testimony concerning the Appellant's demeanor during police questioning nor any other allegations of prosecutorial misconduct deprived the Appellant of a fair trial. The trial court properly considered only admissible evidence and testimony and the Appellant has failed to demostrate otherwise. This appeal should be denied and the Appellant's conviction and sentence should be affirmed. The State respectfully requests this Court issue a decision affirming the decision of the trial court.

Dated this 6th day of June, 2017.

Respectfully submitted,



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COURT OF APPEALS OF THE STATE OF WASHINGTON - DIVISION III

THE STATE OF WASHINGTON, Respondent, v. JOSHUA A. GATHERER, Appellant.	Court of Appeals No: 341101 **DECLARATION OF SERVICE**

DECLARATION

On June 6, 2017 I electronically mailed, through the e-filing portal to Oliver Davis, a copy of the BRIEF OF RESPONDENT in this matter to:

Oliver@washapp.org

I declare under penalty of perjury under the laws of the State of Washington the foregoing statement is true and correct.

Signed at Asotin, Washington on June 6, 2017.

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ASOTIN COUNTY PROSECUTOR'S OFFICE

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